INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Argument	3
Conclusion	10

CITATIONS

Cases:

Bagley, Estate of v. *United States*, 70-1 USTC, par. 12,694	7
Chidsey v. *Brookes*, 130 Ga. 218, 60 S.E. 529	8
Commissioner v. *Estate of Bosch*, 387 U.S. 456	8
Detroit Bank v. *United States*, 317 U.S. 329	7
Edelman, Estate of v. *Commissioner*, 38 T.C. 972	6
Fernandez v. *Wiener*, 326 U.S. 340	9
Foster v. *Foster*, 207 Ga. 519, 63 S.E. 2d 318	8
Hertz v. *Woodman*, 218 U.S. 205	7
Northrop v. *Columbian Lumber Co.*, 186 Fed. 770	8
Osborn v. *Morrison*, 219 Ga. 169, 132 S.E. 2d 58	8
Rogers, Estate of v. *Commissioner*, 320 U.S. 410	7
Snyder v. *United States*, 203 F. Supp. 195	9
Townsend v. *United States*, 232 F. Supp. 219	8
United States v. *Bank of Clarksdale*, 346 F. 2d 638	6
United States v. *Merchants National Bank of Mobile*, 261 F. 2d 570	6
Walker v. *Horton*, 184 Ga. 429, 191 S.E. 462	8
Woodall v. *Pharr*, 119 Ga. App. 692, 168 S.E. 2d 645, affirmed, 226 Ga. 1, 172 S.E. 2d 404	8

Statute:

Internal Revenue Code of 1954, Sec. 2041 (26 U.S.C.)	2-3, 5, 6, 9

Miscellaneous:

	Page
Craven, *Powers of Appointment Act of 1951*, 65 Harv. L. Rev. 55, 70 (1951)	6
Lowndes and Kramer, *Federal Estate & Gift Taxes* (2d ed.), p. 262	6
2 Mertens, *Law of Federal Gift & Estate Taxation*, Sec. 19.09, p. 519	6
S. Rep. No. 382, 82d Cong., 1st Sess., p. 3	7

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 402

ALONZO WIMBERLY JENKINS, JR. and MCLENDON WASH JENKINS, AS EXECUTORS UNDER THE WILL OF MARTHA O. JENKINS, DECEASED, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. A28-A42) is reported at 296 F. Supp. 203. The opinion of the court of appeals (Pet. App. A1-A24), as modified (Pet. App. A26-A27), is not yet reported.

JURISDICTION

The court of appeals entered an opinion and judgment on April 20, 1970 (Pet. App. A1-A25). An or-

der modifying its opinion and denying a petition for rehearing was entered on June 1, 1970 (Pet. App. A26). The petition for a writ of certiorari was filed on July 15, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether decedent, a devisee of an inter vivos power under a will not probated as of the date of her death, died possessed of a general power of appointment within the meaning of Section 2041 of the Internal Revenue Code of 1954.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 2041. POWERS OF APPOINTMENT.

(a) *In General.*—The value of the gross estate shall include the value of all property.

(1) *Powers of appointment created on or before October 21, 1942.*—To the extent of any property with respect to which a general power of appointment created on or before October 21, 1942, is exercised by the decedent—

(A) by will * * *

* * * *

(2) *Powers created after October 21, 1942.*—To the extent of any property with respect to which the decedent has at the time of his death a general power of appointment created after October 21, 1942 * * *

* * * *

(b) *Definitions.*—For purposes of subsection (a)—

(1) *General power of appointment.*—The term "general power of appointment" means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate; except that—

(A) A power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment.

* * * *

STATEMENT

Decedent[1] and her sister, Ada Lee Jenkins, both unmarried, lived together in Midland, Georgia, for many years prior to their deaths (Pet. App. A2; R. 20).[2] On December 23, 1958, both sisters, who were then in their seventies, executed wills which were very similar in wording and provisions (Pet. App. A2; R. 23-32, 33-43). Each sister left the other a life estate coupled with a power of invasion or consumption over the testatrix' property (Pet. App. A2).

On September 24, 1962, Ada Lee Jenkins died (Pet. App. A2; R. 18). Shortly thereafter, on Oc-

---

[1] References to "decedent" are to Martha O. Jenkins; the executors of her estate are the petitioners herein.

[2] "R." references are to the record appendix filed in the court of appeals.

tober 4, 1962, decedent executed a document renouncing her designation as executrix under her sister's will (Pet. App. A2; R. 49). She apparently took no other action with regard to the will (Pet. App. A2). Although decedent had previously been in good health, on October 10, 1962, seventeen days after her sister's death, she suffered a heart attack and died the following day (Pet. App. A2; R. 20). Owing to the short time period between the death of the two sisters, the will of Ada Lee Jenkins had not been probated at the time of decedent's death (Pet. App. A2). The wills of both sisters were thereafter filed and admitted for probate on October 25, 1962 (Pet. App. A2; R. 19, 20).

Each of several provisions in the will of Ada Lee Jenkins[3] leaving property to decedent included language stating in substance (Pet. App. A4-A5) that—

> Should my sister, [decedent], survive me, then in that event, I give, bequeath and devise to * * * [decedent] all my right, title and interest in and to * * * [certain named property] to have, hold, use and enjoy for and during her natural life, with full and unlimited power and authority to dispose of the same in fee simple by gift or otherwise at any time during her life without accountability to anyone * * * and should * * * [decedent] not dispose of my interest in said * * * [property] during her lifetime, then on her death the same shall pass to and become the absolute property of * * * [a certain named remainderman].

---

[3] The relevant clauses of the will in their entirety are set forth at Pet. App. A3-A5, n. 1.

The district court held that the value of the property subject to such power of appointment was not includible in decedent's gross estate for federal tax purposes because (1) an inter vivos power does not qualify as a general power under Section 2041 of the Internal Revenue Code of 1954 (Pet. App. A31-A33), and (2) in any event, the power never came into existence since decedent died before the will creating it was probated (Pet. App. A33-A38).

On appeal, the Fifth Circuit reversed, holding that (1) the statutory definition of general powers includes inter vivos powers exercisable in favor of a decedent or her creditors (Pet. App. A6-A11), and (2) the interest decedent received at the time of her sister's death and before probate constituted a genral power of appointment within the meaning of Section 2041 (Pet. App. A15-A21). The court rejected petitioners' additional contentions that decedent's power was not a general power because it fell within the "ascertainable standard" exception found in Section 2041(b)(1)(A) (Pet. App. A12-A14), and that the inclusion of the property violated the Due Process Clause of the Fifth Amendment (Pet. App. A21-A24).

ARGUMENT

The decision below is correct. There is no conflict or other reason for review.

1. Section 2041(a)(2) of the 1954 Code, *supra*, p. 2, requires inclusion in the gross estate of the value of "any property with respect to which the decedent has at the time of his death a general power

of appointment created after October 21, 1942 * * *." Section 2041(b)(1), *supra*, p. 3, defines a "general power of appointment" as "a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate * * *."

The statute's definition is plainly phrased in the disjunctive, and, therefore, an inter vivos power constitutes a general power of appointment within the meaning of the statute. See *Estate of Edelman* v. *Commissioner*, 38 T.C. 972, 977; Lowndes and Kramer, *Federal Estate & Gift Taxes* (2d ed.), p. 262; Craven, *Powers of Appointment Act of 1951*, 65 Harv. L. Rev. 55, 70; 2 Mertens, *Law of Federal Gift & Estate Taxation*, Sec. 19.09, p. 519. In this instance, the language of the will, *supra*, p. 4, authorized decedent to exercise the power in favor of herself or her creditors and thus constituted a general power under Section 2041.[4]

2. The court of appeals' conclusion (Pet. App. A14-A21) that decedent possessed a power of appointment at the time of her death, although her sis-

---

[4] Petitioners' reliance (Pet. 10-11, 21-22, 24-25) on *United States* v. *Bank of Clarksdale*, 346 F. 2d 638 (C.A. 5), is misplaced, since that case involved a pre-1942 general power. Unlike pre-1942 powers, post-1942 powers, such as that involved here, need not be exercised to be taxed. The holding in *Bank of Clarksdale* was merely that there was no taxable inclusion under Section 2041 because the decedent had not exercised a pre-1942 power. Also distinguishable is *United States* v. *Merchants National Bank of Mobile*, 261 F. 2d 570 (C.A. 5), cited by petitioners (Pet. 10, 18-19), which, like *Bank of Clarksdale*, involved a pre-1942 power. At all events, the cited cases, like the instant case, were decided by the Fifth Circuit, and there is thus no conflict warranting review by this Court.

ter's will had not been probated, is correct. Accord, *Estate of Bagley* v. *United States*, 70-1 USTC, par. 12,694 (M.D. Fla.). It is a settled rule for federal estate tax purposes that rights and interests conveyed by will are deemed to come into existence immediately upon the testator's death. See *Estate of Rogers* v. *Commissioner*, 320 U.S. 410, 413-414; cf. *Detroit Bank* v. *United States*, 317 U.S. 329, 332; *Hertz* v. *Woodman*, 218 U.S. 205, 219-220. This rule not only provides "a test of taxability which is simple, clear-cut, and easy to apply" (S. Rep. No. 382, 82d Cong., 1st Sess., p. 3), but also prevents a situation where the federal taxing provisions would become enmeshed in the "recondite niceties of property law" incident to the timing of perfection of title under the various state probate proceedings (see *Estate of Rogers* v. *Commissioner*, *supra*, p. 414).[5]

---

[5] There is no language in the will itself which evidences a desire on the part of the testatrix that decedent's power of appointment was to be postponed until some time after the testatrix' death. On the contrary, relevant portions of the will indicate that decedent was to obtain the power the moment the testatrix died. For example, Items Five, Seven, Nine and Eleven of the will begin with the words that "Should my sister, Martha O. Jenkins [decedent], survive me, then and in that event, I give, bequeath, and devise to Martha O. Jenkins all my right, title and interest * * *" (R. 24-28). Petitioners' reliance (Pet. 19) on the words in Item Sixteen, "Upon the probate and admission to record of this my will * * *, is misplaced. As the court of appeals held (Pet. App. A15), these words taken "in the context of the entire sentence * * * have reference only to the procedure of probating the will, and not to the timing of the passage of the power of appointment to * * * [decedent]."

Moreover, Georgia law is in accord. Although a Georgia devisee does not receive a perfected title at the moment of the testator's death, he does receive the essence of his interest under the will—an "inchoate title" subject to perfection when the executor assents to the devise. Here, decedent could have exercised her power of appointment before the executors of her sister's estate assented to the devise. The assent of the executors would only have perfected the title of those in whose favor the power had been exercised. See *Walker* v. *Horton*, 184 Ga. 429, 431, 191 S.E. 462, 464.[6] The court of appeals' holding to this effect (Pet. App. A18-A19) is correct. There is no basis for further review of that holding. *Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 462.

---

[6] *Woodall* v. *Pharr*, 119 Ga. App. 692, 168 S.E. 2d 615, affirmed, 226 Ga. 1, 172 S.E. 2d 404, relied on by petitioners (Pet. 15-16), is not in point, merely holding that, in the apparent absence of a will, a decedent's heirs at law could, upon tender of rents, succeed to the decedent's rights as a lessee pursuant to the lease. *Chidsey* v. *Brookes*, 130 Ga. 218, 220, 60 S.E. 529, 530, cited by petitioners (Pet. 13, 15), is distinguishable, holding only that in an action involving disputed title to land, plaintiffs, whose title was derived solely from an unprobated will, were not entitled to recover without probating the will. This latter case was distinguished for like reason in *Northrop* v. *Columbian Lumber Co.*, 186 Fed. 770, 779-780 (C.A. 5). Similarly, *Foster* v. *Foster*, 207 Ga. 519, 527, 63 S.E. 2d 318, 324 (Pet. 15), held that a will must be proved and probated before it can disinherit an heir at law. *Osborn* v. *Morrison*, 219 Ga. 169, 132 S.E. 2d 58 (Pet. 17), involved the devise of a life estate coupled with a power to sell for the devisee's "support and maintenance"; the devise here is much broader (see R. 25-26; Pet. App. A12-A14). The government contended below that the holding of *Townsend* v. *United States*, 232 F. Supp. 219 (E.D. Tex.), was erroneous and the Fifth Circuit agreed (Pet. App. A19-A20, n. 4).

3. Decedent's power of appointment did not fall within Section 2041(b)(1)(A), which excepts from the definition of a general power "A power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent * * *." Here, the will granted decedent (Pet. App. A14) "full and unlimited power and authority to dispose of the [property] in fee simple by gift or otherwise at any time during her life without accountability to anyone." That power was not limited by any "ascertainable standard" within the meaning of Section 2041(b)(1)(A). See Pet. App. A12-A14, A38-A41.

4. As noted above, *supra*, pp. 6-8, decedent possessed an exercisable power of appointment although the will had not been probated. Taxation of property subject to such a power is constitutional, since application of a tax to possession generated by death is permissible. *Fernandez* v. *Wiener*, 326 U.S. 340, 353; *Synder* v. *United States*, 203 F. Supp. 195, 201 (W.D. Ky.). Moreover, petitioner, who was "aware of the existence of her power of appointment as soon as it came into her possession at the time of her sister's death" (Pet. App. A23), could have avoided the tax by renouncing it. She did not do so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JOHNNIE M. WALTERS,
Assistant Attorney General.

THOMAS L. STAPLETON,
LEONARD J. HENZKE, JR.,
Attorneys.

AUGUST 1970.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 400804 - 102